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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/784,090	02/20/2004	Henry W. Bonk	402200003DVC	6886

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EXAMINER

AUGHENBAUGH, WALTER

ART UNIT

PAPER NUMBER

1772

DATE MAILED: 03/16/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b>	<b>Application No.</b> 10/784,090	<b>Applicant(s)</b> BONK ET AL.	
	<b>Examiner</b> Walter B. Aughenbaugh	<b>Art Unit</b> 1772	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 23 February 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.  
 b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b) ☐ They raise the issue of new matter (see NOTE below);  
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: \_\_\_\_\_.  
 Claim(s) objected to: \_\_\_\_\_.  
 Claim(s) rejected: \_\_\_\_\_.  
 Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
see continuation sheet.  
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_.  
 13. ☐ Other: \_\_\_\_\_.

### ADVISORY ACTION

1. Applicant's Request for Reconsideration filed February 23, 2006 has been fully considered but is not persuasive.
2. Applicant's arguments regarding the 35 U.S.C. 102 rejection of claims 1-3, 5, 6, 9 and 10 have been fully considered but are not persuasive.

Applicant argues that "Moureaux fails to limit the amount of polyurethane up to 50%", but Moureaux teaches that the layer contains between 50 and 95% EVOH (see col. 2, lines 36-39 [the "second material" is EVOH, col. 1, line 66-col. 2, line 1] and col. 6, lines 10-26), so an amount of polyurethane up to about 50% falls within the scope of the teaching of Moureaux. Applicant argues that "Moureaux fails to disclose the use of an aliphatic polyurethane", but aliphatic thermoplastic polyurethanes fall within the scope of the teaching of Moureaux of thermoplastic polyurethanes. Applicant argues that "Moureaux does not perform sheet co-extrusion at temperatures and pressures to permit hydrogen bonding to be maintained between a segment of the first layer and second layer", but the claims do not require formation of the device via sheet co-extrusion at any particular temperature range or pressure range.

On page 3 of the Request for Reconsideration, Applicant argues that the first layer claimed in claim 1 "includes about 50 wt. % *or more* of EVOH": this is not required by claim 1 because of the open transitional phrase indicator "comprising". Applicant argues that "the second material of Moureaux is only between about 5% and 20% EVOH", but Moureaux teaches that the layer contains between 50 and 95% EVOH (see col. 2, lines 36-39 and col. 6, lines 10-26) where the "second material" is EVOH (col. 1, line 66-col. 2, line 1), so an amount of polyurethane up to about 50% falls within the scope of the teaching of Moureaux.

In regard to Applicant's arguments in the last paragraph of page 3, Applicant does not show how Moureaux contradicts itself: the two embodiments cited by Applicant are different embodiments, so these cannot contradict each other.

Applicant cites col. 2, lines 25-29 as teaching that the amount of EVOH "with respect to the [amount of polyurethane]" is 5 to 20%, but this is one embodiment taught by Moreaux, and is not required by Moureaux: Moureaux also plainly teaches an embodiment where the amount of EVOH "with respect to the [amount of polyurethane]" is 50 to 95% at col. 2, lines 36-39 and col. 6, lines 10-26. Applicant does not explain how Applicant's discussion on page 4 overcomes the rejection of record: Applicant's discussion here is based on an embodiment of Moureaux that is not relied upon in the rejection of record.

Applicant's discussion on page 5 about the gas transmission rate of Applicant's invention as compared to that of Moureaux is moot since a gas transmission rate is not claimed by Applicant. Applicant argues that Moureaux does not limit the thermoplastic polyurethane to only aliphatic polyurethanes", but there is no requirement that an anticipatory reference "limit" the invention taught in that reference to "only" the species claimed by Applicant: aliphatic thermoplastic polyurethanes fall within the scope of the teaching of Moureaux of thermoplastic polyurethanes.

In regard to Applicant's discussion on page 6 regarding the claimed hydrogen bonding, since ethylene-vinyl alcohol copolymer is a hydrogen-bonding polymer as evidenced by col. 16, lines 19-21 of US 5,766,751 to Kotani et al., and since amide functional groups and ether functional groups are both capable of forming a hydrogen bonds as evidenced by col. 17, lines 61-68 of US 5,300,192 to Hansen et al., hydrogen bonding necessarily occurs between along a

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segment of the film between the first layer that comprises ethylene-vinyl alcohol copolymer of Moureaux and the second layer of block amide polyether of Moureaux. Claim 1 is silent as to the extent of hydrogen bonding relative to the number of C—O bonds formed as a result of the reaction showed at col. 4, lines 5-19.

In regard to Applicant's discussion in the first half of page 7, the claims do not require formation of the device via sheet co-extrusion at any particular temperature range or pressure range. Applicant's statement "Moureaux discloses a membrane having 80-95% polyurethane" does not address the rejection of record. Applicant's statement "Moureaux also does appreciate and expressly use the species of aliphatic polyurethanes, as in the present invention" is consistent with the position of the Office that aliphatic thermoplastic polyurethanes fall within the scope of the teaching of Moureaux of thermoplastic polyurethanes.

3. Applicant's arguments regarding the 35 U.S.C. 103 rejection of claim 4 have been fully considered but are not persuasive.

Applicant's arguments presented on pages 8 through the first full paragraph of page 9 are addressed above in this Advisory Action in regard to Applicant's arguments regarding the 35 U.S.C. 102 rejection of claims 1-3, 5, 6, 9 and 10. Applicant's discussion regarding alleged unexpected results do not address the rejection of record: the only laminate that Applicant discusses is a laminate of a layer of PVDC and urethane elastomer: Applicant has not shown how this addresses the rejection of record of claim 4.

4. Applicant's arguments regarding the 35 U.S.C. 103 rejection of claim 7 have been fully considered but are not persuasive. Applicant's argument here is based entirely on Applicant's argument that Moureaux does not teach an amount of polyurethane up to about 50%, which is

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addressed above in this Advisory Action in regard to Applicant's arguments regarding the 35 U.S.C. 102 rejection of claims 1-3, 5, 6, 9 and 10.

5. Applicant's arguments regarding the 35 U.S.C. 103 rejection of claim 8 have been fully considered but are not persuasive. Applicant's argument here is based entirely on Applicant's argument that Moureaux does not teach an amount of polyurethane up to about 50%, which is addressed above in this Advisory Action in regard to Applicant's arguments regarding the 35 U.S.C. 102 rejection of claims 1-3, 5, 6, 9 and 10.

***Conclusion***


6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Walter B. Aughenbaugh whose telephone number is 571-272-1488. While the examiner sets his work schedule under the Increased Flexitime Policy, he can normally be reached on Monday-Friday from 8:45am to 5:15pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is to 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Walter B. Aughenbaugh  
03/10/06

WBA

  
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1772

3/14/06